

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

8 ROBERTO MIRANDA ZAMARRON,)
9 Petitioner,) Case No.3:10-CV-00094-ECR-VPC
10 vs.)
11 STATE OF NEVADA, *et al.*,) ORDER
12 Respondents.)

13 This is an action on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254,
14 brought by petitioner Roberto Miranda Zamarron, proceeding without counsel. Following abandonment
15 of unexhausted claims, the Court is presented with respondents' Answer (ECF No. 35). Petitioner did
16 not file a reply.

17 || I. Procedural Background

Petitioner was found guilty in 2005, following a jury trial, on four counts of trafficking in a controlled substance in violation of Nevada law. Exhibit 25.¹ He was sentenced to two consecutive and two concurrent terms of ten to 25 years in prison. *Id.* Petitioner completed his state appellate and post-conviction reviews without obtaining relief. He filed his federal petition for writ of habeas corpus with this Court on March 11, 2010, raising three grounds for relief (ECF No. 7).

23 Respondents filed a motion to dismiss the petition claiming petitioner had failed to
24 exhaust ground two and parts of ground three of the petition (ECF No. 9). Petitioner agreed to abandon

²⁶ ¹ The exhibits referenced in this Order were submitted by respondents in support of the motion to dismiss (ECF No. 9) and are found in the Court's record at docket entries 10, 11, 12, 13, 14 and 15.

1 those grounds for relief (ECF No. 32) and respondents filed their answer to the remaining claims (ECF
2 No. 35).

3 **II. Legal Standard**

4 28 U.S.C. §2254(d), a provision of the Antiterrorism and Effective Death Penalty Act
5 (AEDPA), provides the standards of review that this Court applies to the petition in this case:

6 An application for a writ of habeas corpus on behalf of a person
7 in custody pursuant to the judgment of a State court shall not be granted
with respect to any claim that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim --

8 (1) resulted in a decision that was contrary to, or involved an
9 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

10 (2) resulted in a decision that was based on an unreasonable
11 determination of the facts in light of the evidence presented in the State
court proceeding.

13 28 U.S.C. §2254(d).

14 A state court decision is contrary to clearly established Supreme Court precedent, within
15 the meaning of 28 U.S.C. §2254, “if the state court applies a rule that contradicts the governing law set
16 forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially
17 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different
18 from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 1173 (2003)
19 (*quoting Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 149 (2000), and *citing Bell v. Cone*, 535
20 U.S. 685, 694, 122 S.Ct. 1843 (2002)).

21 A state court decision is an unreasonable application of clearly established Supreme Court
22 precedent, within the meaning of 28 U.S.C. §2254(d), “if the state court identifies the correct governing
23 legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts
24 of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 74, 123 S.Ct. 1173 (*quoting Williams*, 529 U.S.
25 at 413, 120 S.Ct. 1495). The “unreasonable application” clause requires the state court decision to be

more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id.* (*quoting Williams*, 529 U.S. at 409, 120 S.Ct. 1495). In determining whether a state court decision is contrary to federal law, this Court looks to the state courts' last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *See Franklin v. Johnson*, 290 F.3d 1223, 1233 n. 3 (9th Cir.2002). With respect to pure questions of fact, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1).

If there is no reasoned decision upon which the Court can rely, then it must make an independent review of the record to determine whether the state court clearly erred in its application of controlling federal law. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir.2000).

III. Discussion

Ground One

Petitioner first claims that there was insufficient evidence presented at trial to establish the elements of Trafficking in a Controlled Substance as to each of the four counts. As to count one, petitioner argues the police did not know and could not prove who put the heroin inside the backpack found in the laundry basket. As to count two, petitioner argues that the weight used to charge and convict him of a level three trafficking charge was inaccurate because the full mixture was weighed - and the full mixture "is never solely heroin." Petitioner also argues that it was never proved that the drugs associated with counts three (heroin) and four (cocaine) found in the silver Lincoln were never shown to be in petitioner's possession or custody, because at the time of his arrest he was driving a gold Nissan.

In determining a claim of insufficient evidence to support a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 C.St 2781, 2789 (1979).

1 The statute under which petitioner was charged and convicted, NRS 453.3385(3), requires
 2 proof that the defendant knowingly and intentionally sold, manufactured, delivered, or brought into this
 3 state or was in actual or constructive possession of 28 grams or more of a Schedule I controlled
 4 substance. Nevada law identified both heroin and cocaine as Schedule I controlled substances. *See*
 5 Nevada Administrative Code (NAC) 453.510(3) and (8).

6 The Nevada Supreme Court denied this claim while applying the proper legal standard
 7 as established by the United States Supreme Court in *Jackson v. Virginia. supra*. *See Lisle v. State*, 113
 8 Nev. 679, 691-92, 941 P.2d 459, 467 (1997). In reviewing the evidence presented, the court noted that

9 [T]he State presented evidence that Miranda-Zamarron had 48.11
 10 grams of heroin on his person at the time of his arrest. When DEA
 11 Task Force officers searched the apartment Miranda-Zamorran shared
 12 with his wife and two small children, they found 154.22 grams of
 13 heroin; the keys to the silver Lincoln; and Miranda-Zamarron's Social
 14 Security card, resident alien card, and receipt for the apartment rent.
 15 The officers found no indication that anyone else lived in the
 16 apartment. While Miranda-Zamarron was under surveillance, he was
 17 the only person observed driving the silver Lincoln. When the Lincoln
 18 was searched, Task Force officers discovered 121.87 grams of heroin
 19 and 139.47 grams of cocaine.

20 We conclude that the jury could reasonably infer from the evidence
 21 presented that Miranda-Zamarron was in possession of heroin and
 22 cocaine seized during his arrest, the search of his apartment, and the
 23 search of the Lincoln and that the amount of heroin he had on his
 24 person at the time of his arrest exceeded 28 grams.

25 Exhibit 34, pp. 3-4.

26 Petitioner has not demonstrated and this Court does not find that the state court's analysis
 27 was unreasonable in either its application of clearly established federal law or in its factual
 28 determinations. Testimony at trial was abundant that petitioner was the only adult male seen entering
 29 the apartment or either vehicle. The drugs were all found in areas where petitioner had actual and
 30 consistent access and the amount of the drugs by weight was more than adequate to meet the minimum
 31 28 grams statutory requirement.

32 Petitioner is not entitled to relief on ground one of the amended petition.

1 Ground Three²

2 In this ground, petitioner raised various claims of ineffective assistance of counsel in
 3 violation of his rights guaranteed by the Sixth and Fourteenth Amendments to the United States
 4 Constitution.

5 To establish ineffective assistance of counsel “a defendant must show both deficient
 6 performance by counsel and prejudice.” *Premo v. Moore* 131 S.Ct. 733, 739 (U.S., 2011) quoting
 7 *Knowles v. Mirzayance*, 556 U.S. ----, ----, 129 S.Ct. 1411, 1419 (2009). “To establish deficient
 8 performance, a person challenging a conviction must show that ‘counsel’s representation fell below an
 9 objective standard of reasonableness.’ *Strickland v. Washington*, 466 U.S.668, 688, 104 S.Ct. 2052
 10 (1984). A court considering a claim of ineffective assistance must apply a “strong presumption” that
 11 counsel’s representation was within the “wide range” of reasonable professional assistance. *Id.*, at 689.
 12 The challenger’s burden is to show “that counsel made errors so serious that counsel was not functioning
 13 as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.*, at 687. “With respect to
 14 prejudice, a challenger must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional
 15 errors, the result of the proceeding would have been different.’ *Id.* The question is whether an attorney’s
 16 representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated
 17 from best practices or most common custom. *Id.* at 690.

18 A. Counsel was ineffective at trial based upon the cumulative effect of errors and
 19 deficiencies in his performance.

20 Petitioner alleges that his counsel, a court appointed conflict counsel who was paid a total
 21 of \$500 to represent him in this case through trial and including preparation of the appeal fast track
 22 statement, failed to provide effective representation due to the cumulative effect of the following errors
 23 and omissions: counsel did not meet with petitioner except at the courthouse; failed to develop any
 24 relationship with petitioner; failed to hire an investigator; considered everything petitioner said to be a

25 ² Ground two was abandoned by petitioner and will not be discussed here.
 26

1 lie but believed police; failed to investigate the confidential informant; failed to adequately test the
 2 prosecution's witnesses through cross-examination; did not object to the admission of a single piece of
 3 evidence; failed to seek a negotiated resolution; failed to mitigate sentence; and failed to write an
 4 adequate fast track statement for appeal.

5 While acknowledging the holding of *Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007),
 6 respondents argue that the United States Supreme Court has “never clearly established that distinct
 7 constitutional claims can be cumulated to grant habeas relief,” thereby precluding section 2254 habeas
 8 relief on such a claim. Answer (ECF No. 35), p. 11.

9 In *Parle*, the Ninth Circuit said,

10 The Supreme Court *has* clearly established that the combined effect of
 11 multiple trial court errors violates due process where it renders the
 12 resulting criminal trial fundamentally unfair. *Chambers [v.*
Mississippi], 410 U.S. 284, 298, 302-03, 93 S.Ct. 1038 (combined
 13 effect of individual errors “denied [Chambers] a trial in accord with
 14 traditional and fundamental standards of due process” and “deprived
 15 Chambers of a fair trial”).⁵ The cumulative effect of multiple errors
 16 can violate due process even where no single error rises to the level of
 17 a constitutional violation or would independently warrant reversal.
 18 *Chambers*, 410 U.S. at 290, n. 3, 93 S.Ct. 1038. [fn 6: omitted.]

19 [fn 5: See also *Montana v. Egelhoff*, 518 U.S. 37, 53, 116
 20 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (stating that *Chambers*
 21 held that “erroneous evidentiary rulings can, in combination,
 22 rise to the level of a due process violation”); *Taylor v.*
Kentucky, 436 U.S. 478, 487 n. 15, 98 S.Ct. 1930, 56 L.Ed.2d
 23 468 (1978) ([T]he cumulative effect of the potentially
 24 damaging circumstances of this case violated the due process
 25 guarantee of fundamental fairness....”).]

26 Although we have never expressly stated that *Chambers*
 27 clearly establishes the cumulative error doctrine, we have long
 28 recognized the due process principles underling *Chambers*.
 29 See, e.g., *Thomas v. Hubbard*, 273 F.3d 1164, 1179-80 (9th
 30 Cir.2002) (analyzing cumulative error in AEDPA habeas
 31 petition); *Whelchel v. Washington*, 232 F.3d 1197, 1212 (9th
 32 Cir.2000) (noting that cumulative error doctrine applies on
 33 pre-AEDPA habeas review); *United States v. Frederick*, 78
 34 F.3d 1370, 1381 (9th Cir.1996) (recognizing the importance
 35 of considering “the cumulative effect of multiple errors”).

Under traditional due process principles, cumulative error warrants habeas relief only where the errors have “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Such “infection” occurs where the combined effect of the errors had a “substantial and injurious effect or influence on the jury’s verdict.” *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710 (internal quotations omitted); *see also Thomas*, 273 F.3d at 1179-81 (noting similarity between *Donnelly* and *Brecht* standards and concluding that “a *Donnelly* violation necessarily meets the requirements of *Brecht*”). In simpler terms, where the combined effect of individually harmless errors renders a criminal defense “far less persuasive than it might [otherwise] have been,” the resulting conviction violates due process. *See Chambers*, 410 U.S. at 294, 302-03, 93 S.Ct. 1038.

Parle v. Runnels, 505 F.3d at 927 (emphasis added).

Respondents’ contention that there is no United States Supreme Court precedent clearly establishing cumulative error because of the Court’s reference to the specific facts of each case where the error has been found, is misplaced. By its very nature, a cumulative error claim requires a careful review of the specific facts of the case to consider how the effect of the errors accumulated to the prejudice of the petitioner. There can be no generalization of the elements required to find cumulative error - each case is unique in itself. But, where the errors rendered the criminal defense ‘far less persuasive,’ ... and thereby have a ‘substantial and injurious effect or influence’ on the jury’s verdict” a due process violation has occurred. Thus, even though the Court in *Chambers, Egelhoff, and Taylor*, *supra.*, note that the specific facts of the particular case warrant the finding of cumulative error, such recognition does not undermine the existence of a due process violation claim based on cumulative error. Such a claim has been clearly established by the United States Supreme Court. *See, id.*

In determining whether the cumulative effect of counsel’s errors created a due process violation, the Court must determine “whether the errors rendered the criminal defense ‘far less persuasive,’” such that there was a ‘substantial and injurious effect or influence’ on the jury’s verdict.” *Parle*, 505 F.3d at 928 (citations omitted). The analysis must consider the combined effect on the outcome, not the impact of each purported error taken alone. *Chambers*, 410 U.S. at 290, n.3, 93 S.Ct.

1 1038. However, only if this Court finds that the state court's determination of the claim was objectively
 2 unreasonable may the evaluation of the errors' impact on the jury verdict follow. *Parle*, 505 F.3d at 927.
 3 At that point, a harmless error analysis must be used to see if there was a "substantial or injurious effect"
 4 on the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S.Ct. 1710 (1993).

5 In evaluating this claim on appeal from post-conviction review, the Nevada Supreme
 6 Court determined there was overwhelming evidence of guilt which precluded any showing that petitioner
 7 had been prejudiced by counsel's failures. Exhibit 76, p. 3. Furthermore, the court noted that petitioner
 8 had failed to demonstrate "how the proceedings would have been different" if counsel had met with him,
 9 not believed the police or slowed down the proceedings at trial. *Id.* In its examination of the ineffective
 10 assistance of counsel claims, the court discussed the large quantities of drugs found to be in his
 11 possession or under his control, noted the police surveillance that tied him to at least two previous drug
 12 transactions with a confidential police informant, and determined that petitioner's assertions as to the
 13 unreliability of the confidential informant were naked allegations with no factual support. *Id.*

14 Petitioner has not demonstrated that the state court's determination of this claim was
 15 objectively unreasonable, either in application of clearly established federal law or in the factual
 16 determinations associated with the analysis of the claim. Petitioner is not entitled to relief on this claim
 17 of ineffective assistance of counsel.

18 C. Counsel was ineffective when he failed to argue that the four separate convictions
 19 violated the prohibition against double jeopardy and should be merged into a
 single charge.

20 Petitioner claims counsel should have argued that the four separate trafficking charges
 21 were actually part of the same act of possession, violating double jeopardy. This claim lacks merit where
 22 the facts and the law support the Nevada Supreme Court's determination.

23 The Double Jeopardy Clause affords a defendant three basic protections: " '[It] protects
 24 against a second prosecution for the same offense after acquittal. It protects against a second prosecution
 25 for the same offense after conviction. And it protects against multiple punishments for the same offense.'

1 ” *Ohio v. Johnson*, 467 U.S. 493, 498-499, 104 S.Ct. 2536, 2540 (U.S.1984) quoting *Brown v. Ohio*,
 2 432 U.S. 161, 165, 97 S.Ct. 2221, 2225 (1977), and *North Carolina v. Pearce*, 395 U.S. 711, 717, 89
 3 S.Ct. 2072, 2076 (1969). In *U.S. v. Blakeney*, 752 F.2d 152 (D.C. Cir. 1985), the circuit court concluded
 4 that possession of quantities of marijuana by the same person but held in separate locations warranted
 5 separate charges. *Id.* at 155.

6 In this instance, the state court properly concluded that the diverse locations of the drugs
 7 and the fact that there were different kinds of drugs found in separate locations supported the separate
 8 charges. *See*, Exhibit 34 (addressing sufficiency of evidence for four counts) and Exhibit 76, p. 2
 9 (discussing appropriateness of separate charges and rational therefor). According to the proceedings at
 10 trial, count one applied to the heroin found inside the apartment located at 4175 Neil Road in a back-
 11 pack. Exhibit 18, pp. 47-48. Count two arose from his possession of the heroin found in his waistband
 12 at the time of his arrest at Coliseum and Peckham in Reno. *Id.* at 32-33. Count three addresses the
 13 heroin found in the silver Lincoln automobile parked at the apartment. *Id.* at 124. Count four charged
 14 petitioner with possession of cocaine found in the Lincoln parked at the apartment. Petitioner possessed
 15 two different kinds of Schedule I controlled substances found in four separate locations in his possession
 16 or under his control, justifying the separate charges imposed here. As a result, petitioner cannot show
 17 that he was prejudiced by counsel’s failure to argue the multiple charges violated double jeopardy. This
 18 claim for relief was properly decided by the Nevada Supreme Court and no relief is warranted under 28
 19 U.S.C. § 2254(d).

20 D. Counsel was ineffective for failing to argue the traffic stop was illegal and for
 21 failing to move to suppress the heroin found in his waistband when they stopped
 his vehicle.

22 Petitioner contends that the traffic stop resulting in his arrest was illegal and that counsel
 23 should have moved to suppress the evidence of the heroin found in his waistband.

24 The Fourth Amendment prohibits unreasonable searches and seizures and the temporary
 25 detention of an individual during the stop of an automobile by the police constitutes a seizure subject
 26

1 to the Fourth Amendment's limitations and protections. *Whren v. U.S.*, 517 U.S. 806, 809-10, 116 S.Ct.
2 1769 (1996). "As a general matter, the decision to stop an automobile is reasonable where the police
3 have probably cause to believe that a [crime] has occurred. *Id.* See also, *Terry v. Ohio*, 392 U.S. 1, 88
4 S.Ct. 1868 (1968).

5 In petitioner's case, the DEA agents who stopped and arrested him had been surveilling
6 petitioner for a matter of weeks and had previously arranged for at least two drug purchases from
7 petitioner using a confidential informant. See Exhibit 76, p. 2. These facts, together with the arranged
8 drug sale to which petitioner was traveling, gave the officers the necessary probable cause to stop his
9 vehicle and arrest him. The search of his person was a reasonable custodial search of an arrestee.
10 *Chimel v. California*, 395 U.S. 752, 762-3 (1969); *Weeks v. United States*, 232 U.S. 383, 392,34 S.Ct.
11 341 (1914).

12 Applying *Chimel* reasonably, the Nevada Supreme Court properly denied petitioner's
13 claims that the traffic stop was improper to effect his arrest and the accompanying search of his body
14 which resulted in the discovery of the heroin in his waistband. This claim lacks merit and no relief is
15 warranted where petitioner cannot show that counsel was ineffective or that he was prejudiced under
16 these circumstances.

17 E. Counsel was ineffective at sentencing for failing to argue that charges should be
18 merged and for failing to present mitigation evidence in an effort to obtain a
lesser sentence.

19 Petitioner argues that counsel failed to properly argue at sentencing that the four charges
20 should merge and that counsel failed to offer mitigating evidence at sentencing to reduce the sentences
21 imposed.

22 As discussed above, the merger argument would have been futile, as the four separate
23 charges were justified under the law and circumstances and the jury convicted on all four counts. In
24 relation to the failure to present mitigating evidence, the Nevada Supreme Court noted that petitioner
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1 had failed to identify any such evidence that would have been available or that such evidence would have
 2 been effective given the large quantities of drugs in petitioner's possession. Exhibit 76, p. 4.

3 Petitioner has not demonstrated that his counsel was ineffective or that he was prejudiced
 4 as a result. Thus, the Nevada Supreme Court's determination that the claim lacked merit is not contrary
 5 to or an objectively unreasonable application of the federal law set out in *Strickland*. This claim will
 6 be denied.

7 **IV. Conclusion**

8 The claims of the petition lack merit and this Court cannot grant relief within the
 9 constraints of 28 U.S.C. § 2254(d). The Amended Petition shall be denied.

10 In order to proceed with an appeal from this court, petitioner must receive a certificate
 11 of appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make "a substantial showing of
 12 the denial of a constitutional right" to warrant a certificate of appealability. *Id.* The Supreme Court has
 13 held that a petitioner "must demonstrate that reasonable jurists would find the district court's assessment
 14 of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

15 The Supreme Court further illuminated the standard for issuance of a certificate of
 16 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

17 We do not require petitioner to prove, before the issuance of a COA, that
 18 some jurists would grant the petition for habeas corpus. Indeed, a claim
 19 can be debatable even though every jurist of reason might agree, after the
 20 COA has been granted and the case has received full consideration, that
 21 petitioner will not prevail. As we stated in *Slack*, "[w]here a district court
 has rejected the constitutional claims on the merits, the showing required
 to satisfy § 2253(c) is straightforward: The petitioner must demonstrate
 that reasonable jurists would find the district court's assessment of the
 constitutional claims debatable or wrong."

22 *Id.* at 1040 (quoting *Slack*, 529 U.S. at 484).

23 The Court has considered the issues raised by petitioner, with respect to whether they
 24 satisfy the standard for issuance of a certificate of appeal, and the Court determines that none meet that
 25 standard. Accordingly, the Court will deny petitioner a certificate of appealability.

26

1 **IT IS THEREFORE ORDERED** that the Amended Petition is **DENIED WITH**
2 **PREJUDICE.**

3 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
4 **APPEALABILITY.** The Clerk shall enter judgment accordingly.

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6 Dated this 30th day of September 2011.

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UNITED STATES DISTRICT JUDGE